

**108th Session**

**Judgment No. 2885**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F. M. against the World Health Organization (WHO) on 28 November 2007 and corrected on 12 January 2008, WHO's reply of 24 April, the complainant's rejoinder of 19 December 2008, corrected on 9 January 2009, and the Organization's surrejoinder of 20 April 2009;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French national, was born in 1970. He joined WHO in September 1998 under a temporary contract. As from 1 November 1999 he held a fixed-term contract as Management Information Systems Officer at grade P.3; his contract was subsequently renewed several times. In December 2002 he was transferred to the newly created P.3 post of Information Systems Officer in the Department of Cooperation and Communication, which was renamed in

2003 the Department of Cooperation and Country Focus (hereinafter “the CCO”).

By a letter of 10 October 2005 the Administration informed the complainant that it was “foreseen” that his post would be abolished on 10 July 2006 but that this did not necessarily mean that his contract would be terminated; the reassignment process would be conducted forthwith and he would be informed of its outcome by 10 April 2006 at the latest. By a further letter, dated 17 January 2006, the Administration confirmed that his post was being abolished for budgetary reasons.

The complainant lodged a notification of intention to appeal with the Headquarters Board of Appeal on 5 December 2005, challenging the decision to abolish his post. Before the Board he alleged that the procedure applicable to the abolition of posts had not been properly followed and that the decision was not based on valid and objective reasons. He also contended that the reassignment process had not been properly followed, and he therefore asked that his reassignment period be extended.

By a letter of 22 November 2006 the complainant was informed that the reassignment committee had considered the options available for him but that no alternative employment had been found. Consequently, the Director-General had decided to terminate his appointment with effect from 28 February 2007.

In its report of 30 March 2007 the Headquarters Board of Appeal found that there was no “solid” evidence that the procedure concerning abolition of posts had not been carried out properly, but it noted that there were “certain unclarities” with regard to the complainant’s performance appraisal reports, the CCO’s budget and its hiring of other staff. It also considered that the reassignment issue was not the subject of the appeal and noted that the complainant’s request for extension of the period of reassignment had already been granted. It recommended that the challenged decision be upheld but that the reassignment committee should “reinforce” its efforts to identify and pursue all reasonable reassignment options for the complainant.

By a letter of 31 August 2007 the Director-General notified the complainant of her decision to maintain the abolition of his post. She agreed with the Board's finding that reassignment was not the subject of the appeal but rejected the recommendation that the reassignment committee should reinforce its efforts to find him other employment. She noted that he had already benefited from an extension of the initial reassignment period and considered that he had been afforded the right to participate in the reassignment process in a timely manner. That is the impugned decision.

B. The complainant submits that the letter of 10 October 2005 did not constitute a formal decision as it merely indicated an "intention" to abolish his post. It did not indicate the date on which the reassignment process would begin or the duration thereof. It was only on 17 January 2006 that the decision to abolish his post was confirmed and the reason given, i.e. budgetary constraints; consequently, he had no possibility of objecting before that date. Also, contrary to the requirements of paragraph II.9.265 of the WHO Manual, the Administration did not provide him with some of the information that had to be listed in the request for abolition of post.

According to the complainant, the importance of his post and the department's activities were ignored. In February 2005 all WHO departments, including his, the CCO, were requested to undertake the Strategic Direction and Competency Review (SDCR) in order to assess the strategic directions of each department and the staff requirements. The Director of his department decided to postpone the review until October 2005, and asked that an internal review – for which the SDCR guidelines did not have to be followed – be carried out. He alleges bad faith and lack of objectivity, explaining that the Director thus resorted to a "secret" review process shortly before the SDCR was conducted and that the decision to abolish his post was taken pursuant to that process. He also submits that under the first phase of the SDCR it was established that there was a need for his post and that the CCO was understaffed. Therefore, in his view, the impugned decision of 31 August 2007 is tainted with a mistake of fact insofar as it upholds the decision to abolish his post.

Further, he contests the validity of the reason given to abolish his post, i.e. budgetary constraints, and submits that the decision to do so stemmed from misuse of authority and was based on personal prejudice. In its letter dated 17 January 2006 WHO informed him that his post would be suppressed because the budget for 2006-2007 had to be reduced. However, according to the statement and figures submitted by the Organization to the Headquarters Board of Appeal, the 2006-2007 budget was in fact higher than that of 2004-2005. The complainant points out that new staff members were recruited within the CCO and that vacancy notices were issued advertising positions with terms of reference that overlapped with his duties. He also refers to a letter found in the “public space in WHO”, by which the Director of his department informed her lawyer that she was suffering from harassment and that the complainant’s request for an extension of the reassignment period would prolong the “work harassment”.

In the complainant’s view, the reassignment process was flawed. He submits that he applied for several positions for which he had the required skills but that the reassignment committee did not recommend him for any of these vacancies. Moreover, the process was terminated prematurely. Indeed, by memorandum of 15 September 2006 he was informed that the Director-General had decided to extend the reassignment period until 8 December 2006, yet on 22 November he was notified that the reassignment process had ended on 27 October and that, since no alternative employment had been found, his contract would be terminated on 28 February 2007.

He further submits that the time taken by the Director-General to render her decision after having received the report of the Headquarters Board of Appeal constitutes a procedural flaw. Indeed, it took her five months to come to a decision, whereas according to the applicable rules, the Director-General should have done so within two months of the date on which she received the Board’s report.

He claims that he suffered “poor treatment” as from the date on which he was informed that his post would be abolished. He also suffered a substantial financial loss, owing to his precarious contract

situation during the period when he had to deal with a complex family situation.

The complainant asks the Tribunal to quash the impugned decision and to hold that the procedures concerning abolition of posts and reassignment were not followed. He claims moral damages, and an award of financial compensation in lieu of reinstatement, as he currently holds a fixed-term contract with another organisation.

C. In its reply WHO indicates that the complainant has filed a second internal appeal contesting the reassignment process, which the Headquarters Board of Appeal is currently examining. Consequently, his complaint is irreceivable for failure to exhaust internal remedies to the extent that it relates to the said reassignment process.

The Organization argues that it was clearly indicated in the letter of 10 October 2005 that the complainant's post would be abolished and he was advised of his rights and obligations and of the procedures that would be followed. Indeed, the letter stated that WHO was doing its utmost to find him alternative employment and that a reassignment committee would look at the possibility of transferring him to another position in the next six months. Moreover, the complainant, in his statement of intention to appeal, indicated that he was challenging the decision to abolish his post that was communicated to him by letter of 10 October 2005. The defendant asserts that he was aware as early as the summer of 2005 that the continuation of his post was subject to the availability of funding and that his department was facing budgetary constraints. According to WHO, the procedure concerning abolition of posts was properly followed. It explains that the information to be provided with a request for abolition of post is specified in paragraph III.3.150 of the Manual and not in paragraph II.9.265, and that the Administration is not required to notify the complainant of this information.

WHO submits that the "secret" review process allegedly conducted within the CCO was in fact the Operational Planning Review, which took place in each department during the first half of

2005. It refutes the complainant's assertion that the Director of the CCO delayed the SDCR exercise and produces a document showing that the SDCR was conducted in a timely manner by the department.

It asserts that the decision to abolish the complainant's post was warranted by financial constraints and was not tainted with misuse of authority. As from 2003 there had been a change in strategy, which led to the restructuring of the CCO. Certain adjustments had to be made in light of the fact that the department's financial resources had been reduced over the years, including in 2006-2007. The Organization denies that the duties of the posts for which the complainant applied were similar to those he used to perform and points out that, unlike the position he used to hold, the advertised positions to which he refers were not funded under the regular budget. WHO also rejects the allegation of personal prejudice. It points out that the complainant, in support of this allegation, relies on a confidential letter sent by the Director of the department to her lawyer. It disputes the assertion that the letter was available in the "public space in WHO" and asks the Tribunal to disregard it as it is privileged.

With regard to the delay in issuing the Director-General's final decision, the Organization states that the complainant was informed by a letter dated 1 June 2007 that, in view of the particular circumstances of his case, the Director-General needed time to consider carefully the report of the Headquarters Board of Appeal and to take a final decision.

The defendant fails to understand how the abolition of the complainant's post could have affected his inheritance rights and considers that his request for financial compensation should be dismissed.

D. In his rejoinder the complainant states that the fact that he might have been aware of the reasons behind the abolition of his post did not preclude the Organization from notifying him of these reasons. He explains that discussions took place three months before he was informed of the abolition of his post and that the situation could

therefore have evolved, in particular given that it was common knowledge in late 2005 that the regular budget of the CCO would be increased for the next biennium and that new staff had been recruited. He also alleges that he did not receive notice of termination within the usual three-month period before the end of the contract.

He extends his claims to include an award of costs in the amount of 20,000 Swiss francs. He explains that he has suffered serious financial damages because of the unsuccessful reassignment process and the fact that, following the termination of his contract, he was only offered a short-term position, which was classified within the same grade at several steps below his previous level.

E. In its surrejoinder the Organization indicates that the complainant fails to distinguish between the draft budget allocation for 2006-2007 and the approved budget, which was reduced. It asks the Tribunal to admonish the complainant and his counsel for having produced a confidential document without authorisation. It also draws attention to the fact that he was granted a two-year fixed-term appointment at grade P.4 immediately after the short-term position to which he refers.

## CONSIDERATIONS

1. The complainant contends that the decision of the Director-General dismissing his internal appeal with respect to a decision to abolish his post within his department, the CCO, should be set aside and that he should be awarded material and moral damages. He claims that the decision was not based on tenable and objective grounds but, instead, resulted from a misuse of power and abusive procedures. In addition, he makes a number of complaints as to the reassignment process mandated by the WHO Manual when a post is abolished. The reassignment process and the subsequent decision terminating his services are the subject of other proceedings and can be taken into account only to the extent, if any, that they are capable of supporting the complainant's arguments with respect to the decision to abolish his post.

2. The first argument made by the complainant is that he was not given proper notice of the abolition of his post. He was informed by a letter from an officer of Human Resources Services dated 10 October 2005 that, as previously advised by the Director of his department – his second-level supervisor – it was foreseen that his post would be abolished from 10 July 2006 but that this did not necessarily mean that his employment would come to an end. He was also informed that the reassignment process required by the WHO Manual would commence forthwith and that he would be advised not later than 10 April 2006 as to its outcome. The complainant wrote to the above-mentioned officer on 28 October 2005 stating that, contrary to what had been said in the letter of 10 October, he had not been informed of the abolition of his post and requesting the reasons for the decision in that regard. On 5 December 2005 he filed a notice of intention to appeal the decision communicated by the letter of 10 October 2005. He was informed by letter dated 17 January 2006 that his post was being abolished for budgetary reasons, there having been a reduction in the department’s budget for the forthcoming biennium. The same letter informed him that the decision to abolish his post was final.

3. The complainant now asserts that there was no valid decision to abolish his post until 17 January 2006, that he had no opportunity to be heard until he was informed of the reasons for its abolition and that the reassignment process should not have commenced until 17 January. These arguments may be dealt with shortly. The evidence is that, as early as June 2005, the complainant’s second-level supervisor informed him that his post might be abolished for financial reasons. In that context, the letter of 10 October 2005 specifying a definite date for its abolition and informing him of the commencement of the reassignment process could only be construed as a final decision to abolish the post. Moreover, his notice of intention to appeal indicates that it was clearly so understood by him. However, he was not officially informed of the reasons until 17 January 2006. This was contrary to WHO Manual

paragraph II.9.270 and entitles the complainant to moral damages in the amount of 4,000 Swiss francs. So far as concerns the time for the commencement of the reassignment process, that is a question to be decided in the proceedings directed to that matter.

4. The complainant contends that proper procedures were not followed for the abolition of his post, that the reasoning behind its abolition was “deceptive and unsubstantiated”, that efforts were not made to maintain the post, that his duties were essential, that the decision was motivated by personal reasons and that there was no financial reason why his post should be abolished. It is convenient to deal in the first instance with the question relating to finances.

5. In her memorandum of 14 July 2005 to the Assistant Director-General responsible for her department, the complainant’s second-level supervisor stated in recommending the abolition of his post that “the Regular Budget allocation for the Department has been reduced for the next and subsequent biennia”. Although it is clear that the CCO was then facing budget restrictions, the regular budget was in fact increased by 22,000 United States dollars. However, the total budget, which included voluntary contributions and funds from other sources, decreased significantly, while staffing costs increased by 18 per cent. The complainant contends that the actual reduction in total budget and the increase in staff costs are irrelevant as the decision to abolish his post was based on an error of fact, namely, a reduction in the regular budget. This argument must be rejected. The decision to abolish the complainant’s post was taken by the Director-General on 26 September 2005, more than two months after the memorandum in question. It is not to be supposed that, at that stage, the Director-General was unaware of the increase in staffing costs and the prospect of a decrease in total funds for the CCO. It may also be noted at this point that there has been a significant reduction in the staff of the department from 35 in July 2003 to 12 in April 2009.

6. WHO Manual paragraph III.3.150 provides that requests for the abolition of a post must contain:

- “• a description of the organizational location of the post and its relationship to other posts;
- a detailed explanation of how the work of the post would be reduced, eliminated, reorganized or reassigned to (an)other post(s) or activity or activities, together with the reasons therefor;
- where appropriate, evidence to show what efforts have been made to maintain the post;
- financial, programmatic or other objective reasons for the proposed post abolition in the context of the relevant workplan(s) derived from the programme budget and, if possible, supported by other evidence; and
- any other salient information.”

There is no requirement that the proposal be provided to the occupant of the post in question and, thus, the complainant’s argument that it should have been is rejected.

7. In her proposal for the abolition of the complainant’s post, the Director of the department stated that, in light of a request “to analyze the existing and anticipated staffing requirements [...] to reflect the staff budget allocation planned for the next and subsequent biennia” and “following an internal review”, there was no longer a need for the complainant’s post. She attached a post description and a sheet highlighting the duties of the post in the 2005 work plan “that still require[d] implementation” and providing an indication “of the remaining posts [...] to [which] those duties [would] be redistributed”. The complainant contends that there was no internal review, that it was wrong to say there was no need for his post, that it was not realistic to distribute the functions in the way proposed and that there was no evidence of efforts to maintain the post. By reference to these matters, he claims that there was no objective reason for the abolition of his post and that the decision was based on errors of fact and also failed to take account of material facts.

8. In relation to his claim that there was no internal review, the complainant argues that the Director of his department postponed a Strategic Direction and Competency Review (SDCR) until October 2005 and, instead, “purportedly carried out a so-called internal review”,

thereby denying him the safeguards inherent in the SDCR. In fact, the Director prepared an operational review in May 2005, as did other departments, in the light of the budget forecasts; she based her recommendation on that review. The SDCR was intended to serve a different purpose and there is no evidence that the Director delayed that exercise or that its timing was in any way connected with her recommendation for the abolition of the complainant's post.

9. The complainant contends that it was not correct, as stated in the proposal of the Director of his department, that there was no need for his post. In this regard he claims that she informed him on 1 July 2005 that the abolition of his post would not be based on the utility of its functions. That statement is denied although it is, to some extent, supported by an e-mail from the complainant that, apparently, was not answered by the Director. However, the question is not whether that statement was then made but whether the statement in the proposal for the abolition of the post was objectively correct. And that question has to be answered in the context of changes in the functions and focus of the CCO and the possible assignment of duties to other posts. Commencing in 2003, there were changes in the CCO with a number of its functions, including some performed by the complainant, being transferred to other departments. Thus, as the complainant notes, the post description accompanying the Director's proposal in July 2005 was, by then, out of date. Nevertheless, the complainant contends that the duties that were then performed by him were essential to the department and that they could not realistically be assigned in the manner proposed by the Director.

10. In support of his claim that his duties were essential to the department, the complainant relies on the SDCR which, in October 2005, identified its core functions, two of which, according to him, were embraced by his post. He also asserts that it was impractical to assign those functions in the way proposed by the Director of his department and that, in fact, they were performed by the occupants of two short-term posts. What he does not mention is that the SDCR indicated that the department was facing a reduced budget and that its

functions and focus had changed. One of the significant changes was that a number of functions previously performed by the complainant had been transferred to the Department of Governance and that his information and technologies functions for the CCO had been discontinued. Nor does he mention that relatively junior staff filled the two short-term posts and that they were financed from funds not available for a regular budget post. Further, the fact that the incumbents of some of the posts to which the Director indicated his duties would be assigned have since changed or have been absent on sick leave does not indicate that the duties could not be assigned to those posts. Having regard to these matters, the complainant has not established that his post was essential and that it was, thus, incorrect to say that it was no longer needed. And on the basis that his post was no longer needed, it is not relevant that efforts were not made to retain it. Thus, the complainant has failed to prove that the decision to abolish his post was not based on objective grounds or was otherwise vitiated by an error of fact, the failure to take account of material facts or by procedural error.

11. The argument that the decision to abolish the complainant's post was motivated by "personal" reasons finds some support in the report of the Headquarters Board of Appeal. Although the Board recommended that the decision to abolish the post should stand, it stated that there were "certain unclarities regarding the [complainant's performance appraisal report], the budget, and the hiring of other staff which did not fully convince them that the basis for the post abolition was solely for budgetary and programmatic reasons or for strategic needs". The Board also noted that the complainant's performance appraisal report signed in January 2004 was "of a positive nature" whereas that signed by his then second-level supervisor in June 2005 "seem[ed] to indicate a performance problem". It also noted that it was said in that latter report that "[c]ontinuation of post [...] [was] subject to availability of fundings", which, the Board said, was "unusual and inappropriate". However, the Board made no finding of personal prejudice, bias, bad faith, malice or abuse of authority, all of which had been alleged by the complainant in his internal appeal.

12. The Tribunal's finding with respect to budgetary constraints makes it unnecessary to consider the Board's statement in that regard. So, too, it is unnecessary to consider its reference to the "hiring of other staff" as the staff in question were appointed on short-term contracts in posts financed from funds not available for regular budget posts. It is, however, necessary to consider its statement with respect to the complainant's performance. Before doing so, it is convenient to note that there is a "misuse of authority where an administration acts for reasons that are extraneous to the organisation's best interests and seeks some objective other than those which the authority vested in it is intended to serve" (see Judgment 1129, under 8). It may be accepted that it is a misuse of authority if a post is abolished in order to circumvent the relevant procedures applicable in the case of unsatisfactory performance. Even so, "misuse of authority may not be presumed and the burden of proof is on the party that pleads it" (see Judgment 2116, under 4).

13. In support of his claim of misuse of authority, the complainant relies on a letter written by the Director of his department to her lawyer dated 9 May 2006, some ten months after her proposal that his post should be abolished. It is clear that the letter was sent for the purpose of obtaining legal advice and, thus, *prima facie*, it is privileged. WHO contends that, on this account, the Tribunal should have no regard to the letter. However, privilege can be waived. The complainant asserts that the letter was found "in the public space in WHO" but gives no other explanation as to how he came by the letter. The materials are not sufficient for the Tribunal to determine whether privilege still attaches to the letter. For the sake of completeness, the Tribunal notes that the main thrust of the letter from the Director was that the Administration was not giving her proper support in the face of verbal aggression from her staff. In that context, she referred to the complainant's request for an extension of the period of reassignment and stated that that would prolong the situation, which she categorised as "work harassment". Although the letter indicates that the complainant's Director, who is also his second-level supervisor, was not entirely happy with his performance, there is nothing to suggest

that that was in any way related to her recommendation that his post be abolished. Certainly, the letter does not indicate any animosity or antipathy towards the complainant at the time when the abolition of his post was proposed. Accordingly, it provides no basis for a finding of misuse of authority.

14. Two other matters should be mentioned. First, the claims made by the complainant relating to the reassignment process and the subsequent decision to terminate his services provide no support for the notion that the recommendation and/ or the decision to abolish his post involved a misuse of authority or other improper purpose. The second matter relates to the Director-General's decision to reject the complainant's internal appeal. In accordance with WHO Staff Rule 1230.3.1, that decision should have been taken within sixty days of the receipt of the report of the Headquarters Board of Appeal. That report was received on 5 April 2007. On 1 June 2007 the Director of the Human Resources Services wrote to the complainant requesting his "indulgence for a limited period" and stating that "[e]very effort [was] being made to ensure that this difficult process [was] brought to a satisfactory conclusion in the shortest time span possible". As the complainant's employment had come to an end three months previously, namely on 28 February 2007, it is difficult to see that further time could result in a satisfactory conclusion. As it happened, a final decision was not taken until 31 August 2007. The complainant is entitled to moral damages in the amount of 2,000 Swiss francs with respect to this delay. As he succeeds in part, he is entitled to costs in the amount of 2,000 francs.

## DECISION

For the above reasons,

1. WHO shall pay the complainant moral damages in the sum of 6,000 Swiss francs and costs in the amount of 2,000 francs.
2. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 6 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron  
Agustín Gordillo  
Dolores M. Hansen  
Catherine Comtet